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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN TERRELL MCALISTER, Defendant and Appellant.	B252185 (Los Angeles County Super. Ct. No. YA085936)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Christian Terrell McAlister (McAlister) was charged with sexual penetration by foreign object (count 1, Pen. Code, § 289, subd. (a)(1));[1] forcible oral copulation (count 3, § 288a, subd. (c)(2)(A)); rape (count 3, § 261, subd. (a)(2)); criminal threats (count 4, § 422, subd. (a)); assault by means to produce great bodily injury (count 5, § 245, subd. (a)(4)); and false imprisonment by violence (count 6, § 236). As to all counts, the information alleged a prior criminal threats conviction (§§ 667, subd. (a)(1), 1170.12, subds. (a)-(d)). After a jury trial, McAlister was found guilty. In a bench trial, the trial court found the prior conviction true.

McAlister was sentenced to a total of 41 years: count 1—the midterm of 12 years, doubled as a second strike; count 2—the midterm of 12 years, doubled as a second strike, run consecutive; count 3—the midterm of 12 years, doubled as a second strike, run consecutive; count 4—the midterm of four years, run concurrent; count 5—the midterm of three years, run concurrent; and count 6—the midterm of two years, run concurrent, plus five years pursuant to section 667, subdivision (a)(1). He was credited with 392 days precommitment confinement, including 51 days conduct credit.

On appeal, McAlister contends that his convictions must be reversed because the trial court erred by admitting evidence of prior acts under Evidence Code sections 1101 and 1109. We find no error and affirm.

FACTS

Ruling Regarding Evidence of Prior Acts

Based on a pretrial motion by the People regarding prior acts evidence, the trial court ruled that evidence of prior acts of domestic violence against Christy S. and Candace D. was admissible under Evidence Code section 1109, and evidence of various uncharged crimes against M.K. was admissible pursuant to Evidence Code section 1101, subdivision (b). It found that the "prior incidents demonstrate a motive to control and dominate and hurt women. These prior incidents tend to bolster the credibility of the complaining witness in this case."

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Prosecution Case

The Charged Crimes

V.J. (V.) and McAlister dated for a few months. The relationship was sexual. She ended the relationship because he was drinking too much, and because he pushed her, which was frightening.

About a year later, V. posted on Facebook, "Who does great tattoos?" She was referred to McAlister. V. sent him a text message, and he replied that he was doing great and had stopped drinking. They communicated for about a week through text messages and Facebook.

McAlister asked her to come to his house. V. said she did not want to have sex because she was menstruating and had just gotten her tongue pierced. McAlister said, "That's fine. I don't want to have sex. I just want to touch you up, chill with you, and smoke you out."

They met the next day at about 7:30 p.m. When they arrived at his house, she saw McAlister's mother and some other people in the living room. V. went to McAlister's bedroom. He had asked her to spend the night, so that was her intention. After going into another room for about five minutes, McAlister eventually joined V. She drank juice while he drank beer. They both smoked marijuana.

At some point, V. hugged and kissed McAlister, and they said that they had missed each other. Before or after they hugged and kissed, McAlister told V. that he wanted to look at her. She took off her clothes and modeled her bra and underwear for him. Eventually, McAlister began acting "weird." He began mumbling to himself, and hitting himself in the jaw. V. fell asleep on McAlister's bed.

At about 4:00 a.m., V.'s cell phone rang. The call was from a number she did not recognize. McAlister said, "Your pimp nigga is coming" and "I can't get none because I'm not him." She did not know what McAlister meant. Though she had been a prostitute for a brief period in the past, that she was not something she had told him.

McAlister closed the bedroom window, blocked the door with a nightstand, and turned up the volume on his television. He told V., "You're going to get beat, and you're

not going to leave here unless I see blood, and you're dead. I'm not afraid to go to jail tonight." While V. was sitting on the edge of the bed, he hit her. She tried to hit him back. He grabbed her by the hair, shoved her to the floor, and rubbed her face on the carpet. Then he choked her. She screamed, which prompted him to say, "Don't scream. You'll just make things worse." He also said, "I hope you told your mom you love her because you'll never see her." While repeatedly hitting her, he kept saying that he was not afraid to go to jail, and that "the devil's coming out." He stated that when he got out of jail, he would kill V. and her family.

Periodically, McAlister took a break from beating her to smoke a cigarette while he watched her cry. Though it was dark, she believed she saw him place a gun near the television. He said he had loaded the gun because he had prepared for something "stupid" to happen.

In between the various beatings, she repeatedly asked what she could do to get him to stop. After awhile, McAlister sat next to her, handed her a marijuana cigarette and said, "Well, I guess there's something you can do, but I'm going to embarrass you, and make sure you're in pain." At some point, she put on her sweater. He started taking photographs of her crying and said he was going to post them on Facebook to humiliate her.

McAlister proceeded to rape V. and commit other sex offenses. Afterwards, they fell asleep. He awakened and she had sex with him because she was afraid he would beat her again. When the sun came up, she said she was ready to go. He said he wanted oral sex and "everything." She complied, and he finally let her leave.

Prior Acts Evidence

Christy S.

On October 21, 2006, McAlister and Christy S. were dating. He asked her if she had any money and she said replied "no." He then took $100 from her. He said he was "going to put [her] with [her] mother[.]" At the time, Christy S.'s mother was deceased. He hit and stuck her with a sword, and he kicked her in the side, stomach and face.

On June 29, 2007, McAlister punched Christy S. in the eye because she would not give him money. Afterwards, she called the police. When they arrived, she said that McAlister had been holding her against her will. With respect to this incident, McAlister was convicted of violating a domestic violence restraining order. (§ 273.6, subd. (a).)

Candace D.

Candace D. started dating McAlister when she was in high school. When she was 17 years old, she moved into his house. A couple of months later, they got into an argument. He punched her in the arm, and she moved out. Because she loved him, she returned. When they argued, he would push or punch her. Once, he gave her a black eye. If she tried to leave during an argument, he would hold her against her will.

After Candace D. got pregnant, she moved to her aunt's house. However, she continued to see McAlister.

On November 22, 2006, McAlister appeared at the house where Candace D. was living with her mother and grandfather. McAlister called Candace D. a "bitch" and a "whore." He picked up a knife from the kitchen. When Candace D.'s grandfather went to call the police, McAlister dropped the knife. On August 1, 2007, Candace D. asked McAlister for some diapers for their son. They argued, and he asked who she was seeing. She hit him. He pushed and punched Candace D. and spit in her face. She asked him to leave, but he refused. McAlister was angry that she was not answering his questions. He told her, "I got a bullet for you" and "you are not going to live a week."

About a year before the trial, Candace D. went to McAlister's house to pick up their son. Their son was not there. McAlister took Candace D. into his bedroom. They spoke for a while about life and their son. After McAlister tried to kiss her and she resisted, he asked if she had slept with one of his friends. She did not answer the question, and he pushed and punched her. He grabbed her by the hair, and she punched him. She had sex with him to diffuse the situation, which was a tactic that she had used in the past. After they had sex, he continued to ask questions about her sex life, and she tried to leave. To block her exit, he put a small dresser in front of the bedroom door. He pushed her and grabbed her hair. He held a glass bottle. She believed he was going to hit

her with it. McAlister's mother came to the door and asked if everything was all right. Candace D. wanted to calm McAlister down, so she said everything was fine.

M.K.

M.K. started interacting with McAlister on MySpace about three years before the trial. On August 13, 2008, she went to his house. They went into his bedroom, sat on his bed and listened to music. He walked out of the room. When he returned, he was talking on his phone. He motioned like M.K. and he were "supposed to hook up or something." Into the phone, he said, "This bitch acting stuck up. You already know her type. . . . I already know how to deal with her." He also said, "We gonna run a train on this bitch." She understood that to mean that McAlister and his friends were going to rape her.

After he ended the phone call, she moved to the living room. He went into the kitchen and began mumbling about "stuck up bitches." She texted her friend. He asked who she was on the phone with, and she said it was "nobody," and that she had to go in a minute. He told her she "might as well just chill" because his friends were coming over. That prompted her to say that she did not want to meet any of his friends. In response, he said there was no point in her leaving because by the time somebody got there, all they would be doing "is verifying a body." She thought she was going to die.

She walked out the front door and into an enclosed porch. She could not get out because the porch door was locked. For about 15 or 20 minutes, she stood there texting on her phone. McAlister opened the front door and said he knew how to handle her. They began arguing. He spit at her. Then he swung a chain at her, accused her of trespassing and said he was going to call the police if she did not leave.

Instructions Regarding Prior Acts

The trial court instructed the jury that it could consider the prior acts of domestic violence against Christy S. and Candace D. as evidence that McAlister was inclined to commit domestic violence, and that he was also inclined to commit the charged offenses. As to the uncharged crimes against M.K., the trial court instructed that the jury could use the evidence to determine whether McAlister acted with the intent to cause V. physical harm.

DISCUSSION

According to McAlister, (1) the trial court abused its discretion by admitting evidence of his prior acts of domestic violence under Evidence Code section 1109 because there was an insufficient showing that he and V. had a "dating relationship," and because the prior acts did not involve sex offenses; and (2) the trial court abused its discretion in admitting evidence of uncharged crimes against M.K. under Evidence Code section 1101, subdivision (b) because the uncharged crimes were not sufficiently similar to the charged crimes against V. and could not be used to prove, inter alia, intent to cause harm.

A trial court's admission of evidence pursuant to Evidence Code sections 1101 and 1109 is reviewed for an abuse of discretion. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138, *People v. Lewis* (2001) 25 Cal.4th 610, 637.) Upon review, we find no basis to reverse.

I. The Trial Court Properly Admitted Prior Acts of Domestic Violence Under Evidence Code Section 1109.

Except as provided by statutes such as Evidence Code sections 1109, "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) To the extent allowed by Evidence Code section 352, prior acts of domestic violence are admissible in a criminal action "in which the defendant is accused of an offense involving domestic violence[.]" (Evid. Code, § 1109, subd. (a)(1).) An act of abuse involves domestic violence if the perpetrator and victim have had a dating relationship. (Evid. Code, § 1109, subd. (b); § 13700, subds. (a) and (b).)

When applying Evidence Code section 1109, courts look to the Domestic Violence Prevention Act for the definition of a dating relationship. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1116.) It "means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations." (Fam. Code, § 6210.) This definition does not encompass a casual relationship or an ordinary fraternization between two individuals in a business or

social context. (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1323 [applying the definition to a charge that defendant battered a person with whom he had a dating relationship in violation of section 243, subd. (e)(1)].)

Below, the People's pretrial motion to admit other acts of domestic violence contained a statement of facts. The first sentence was this: "Victim [V.J.] and . . . McAlister were previously in a dating relationship." At the hearing on the motion, the defense objected to the evidence based on Evidence Code section 352 and other grounds. However, he never argued that the People failed to establish the existence of a prior or current dating relationship between V. and McAlister. As a result, the parties assumed that there was a dating relationship, and the trial court was not asked to rule on the issue.

Because McAlister did not object based on the absence of a dating relationship, that objection has not been preserved for appellate review. (*People v. Bolden* (2002) 29 Cal.4th 515, 547.) Nonetheless, for the sake of being complete, we briefly review McAlister's claim of error.

Given that the People represented in their pretrial motion that V. and McAlister were previously in a dating relationship, and given that there was no dispute, the trial court did not abuse its discretion assuming the existence of a dating relationship and applying Evidence Code section 1109. Also, prior to the admission of the prior acts evidence, V. was asked how she knew McAlister. She testified: "Through Facebook, and we dated." They dated a year or two before the trial, and it lasted "a few months." During that time, they were having a consensual sexual relationship. She ended the "relationship" because McAlister was "drinking too much" and she "got scared." From V.'s testimony, the trial court could have reasonably inferred that for the few months V. and McAlister dated, they had frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement.

Having resolved whether there was a dating relationship to support the application of Evidence Code section 1109, we turn to McAlister's claim that the prior acts were inadmissible under Evidence Code section 1109 because they did not involve sex

offenses. He relies on Evidence Code section 1108, subdivision (a) which provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (*People v. Story* (2009) 45 Cal.4th 1282, 1291; *People v. Walker* (2006) 139 Cal.App.4th 782, 796–797 [Evid. Code, § 1108 allows evidence of propensity to commit charged offense].) McAlister's reliance on Evidence Code section 1108 is misplaced because it does not qualify Evidence Code section 1109, which is an independent basis for the admission of propensity evidence.

In the last sentence of his discussion of Evidence Code section 1109 evidence in his opening brief, McAlister states that "it was manifestly prejudicial to introduce prior domestic violence evidence—which necessarily presupposes a significant sexual relationship between the parties—in a rape trial." We take this to mean that McAlister claims that the evidence was barred by Evidence Code section 352. Under that statute, the trial court had the discretion to exclude the prior acts evidence if its probative value was substantially outweighed by the probability that its admission would (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) After considering the whole record, we conclude that the trial court did not abuse its discretion under Evidence Code section 352. The evidence was highly probative because it showed that McAlister had a propensity to push and punch women; to lure women to his bedroom with the expectation of sex and then to become violent if they did not comply with his expectation; to falsely imprison them; to threaten them with weapons; and to threaten to kill them. Given the similarities between his charged crimes and uncharged crimes, the probative value of the evidence was not outweighed by its inflammatory nature, or the likelihood it would confuse the jury.

II. The Trial Court Properly Admitted Uncharged Crimes Against M.K. Under Evidence Code Section 1101, Subdivision (b).

While Evidence Code section 1101, subdivision (a) prohibits evidence of uncharged misconduct to prove the conduct of a person on a specific occasion, evidence of uncharged conduct is not inadmissible to prove some other fact. (Evid. Code, § 1101, subd. (b).) Thus, subject to an Evidence Code section 352 objection, if the charged crime and the uncharged misconduct are sufficiently similar, the uncharged misconduct can be offered to establish criminal intent. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.) The least degree of similarity is required for evidence of a prior act to be admissible to prove intent. Greater similarity is required to prove the existence of a common plan or design. And the greatest similarity is required to prove identity. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) Due to the inherent risk of prejudice posed when a prosecutor offers evidence of uncharged misconduct, it is admissible only if it has substantial probative value. (*Id*. at p. 1331.)

According to McAlister, there was insufficient similarly between the incidents involving V. and M.K. Therefore, the incident involving M.K. could not be used to prove that he intended to cause V. harm. We disagree. He lured both women to his bedroom with an apparent expectation of sex; he started out talking to them casually but then got angry when he believed they did not want to have sex; he became jealous; he threatened to kill both women; he prevented them from leaving his house; and he became physically violent. Accordingly, we conclude that the trial court properly admitted the uncharged crimes against M.K.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____,J.
CHAVEZ

_____, J.
HOFFSTADT